

ORIGINAL

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

**RECEIVED**  
**FEB 12 1995**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**OFFICE OF THE SECRETARY**

In the Matter of )

JAMES A. KAY, JR. )

Licensee of one hundred sixty )  
four Part 90 licenses in the )  
Los Angeles, California area )

PR DOCKET NO. 94-147  
WT DOCKET NO. 94-147

To: Administrative Law Judge Richard L. Sippel

DOCKET FILE COPY ORIGINAL

MOTION TO DEFER PROCEEDINGS

James A. Kay, Jr. (Kay), by his attorneys, respectfully requests that all activities in the above captioned proceeding be deferred, pending action by the Chairman on complaints which Kay has filed with the Chairman against three Commission employees who participated in investigating his activities in contemplation of the instant proceeding. In support of his position, Kay shows the following.

In complaints to the Chairman, Kay demonstrated that W. Riley Hollingsworth (Hollingsworth), Deputy Chief, Licensing Division, Private Radio Bureau; and Terry L. Fishel (Fishel), Chief, Land Mobile Branch, Licensing Division; willfully and repeatedly violated the

Commission's Rules in the course of their investigation of him.<sup>1</sup> Although the complaints were filed many months ago, the Chairman has not yet acted on them.

A determination by the Chairman on the complaints would materially assist the Administrative Law Judge (the Judge) in reaching a decision in the instant matter. Were the Chairman to determine that Hollingsworth and/or Fishel had violated the Commission's Rules to Kay's detriment in the course of the investigation, such a decision could allow the Judge to terminate this matter at any early point in the proceeding, thereby saving all parties a great deal of effort.

One of the complaints which Kay has filed against a Commission employee, specifically, the Complaint against Fishel, was a consequence of Fishel's action in the matter of Liberty Paving Co., Inc. (Liberty). In that matter, Fishel had granted reinstatement to Liberty of the license for Business Radio Service station WRG921. As a basis for his action, Fishel's letter action, dated April 19, 1994, stated that "we have your letter stating that you signed a blank FCC Form 405A in the mistaken belief that you had to assign your station to Lucky's Two-Way Radios."

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<sup>1</sup> Copies of the complaints are attached as Exhibit I hereto for the Judge's convenience.

Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §405(a), provides that in any case in which a petition for reconsideration "relates to an instrument of authorization granted without a hearing, the Commission or designated authority shall take such action within ninety days of the filing of such petition." Kay filed two petitions for reconsideration of the reinstatement of the license for station WRG921. The first requested reconsideration of the letter action signed by Fishel and that petition was filed on May 5, 1994. The second requested reconsideration of the Commission's actual issuance of a reinstated license to Liberty and that petition was filed on June 15, 1994. It is now January 1995 and the Commission has yet to act on Kay's petitions.

The Commission failed to comply with the express requirement of Section 405(a) of the Act. At paragraph 10(f) of the OSC, the Commission designated an issue "to determine whether James A. Kay, Jr. has abused the Commission's processes in order to obtain cancellation of other licenses." Until such time as the Commission acts on Kay's petition(s) for reconsideration in the Liberty matter, the issue designated at paragraph 10(f) will be ripe for consideration by the Judge. Accordingly, until such time as the Commission takes overdue final action on Kay's currently pending petition for reconsideration, the Judge should defer all further proceedings in the instant matter.<sup>3</sup>

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<sup>3</sup> Kay reserves until a more appropriate time, an issue as to whether the Commission has lost the power to designate the issue specified by paragraph 10(f) of the OSC by its failure to comply with the terms of the Act in the Liberty matter.

The Liberty matter is not the only proceeding in which the Commission has failed to comply with Section 405(a) of the Act with respect to a petition for reconsideration filed by Kay. As detailed in Kay's complaint to the Chairman concerning Hollingsworth, in other proceedings, Kay has not received action by the Commission on his petitions for reconsideration within the time mandated by Section 405(a) of the Act.

Concurrently with the filing of the instant Motion, Kay is filing with the Commission a Motion to Enlarge, Change, or Delete Issues (Motion to Enlarge). Kay's Motion to the Commission requests the enlargement of certain issues, and the deletion of or changes in others of the designated issues. (A copy of Kay's Motion to Enlarge is attached hereto for the Judge's convenience.) Until such time as the Commission acts on Kay's Motion to Enlarge, it would appear that further activity in the instant proceeding would be premature and potentially wasteful to all involved.

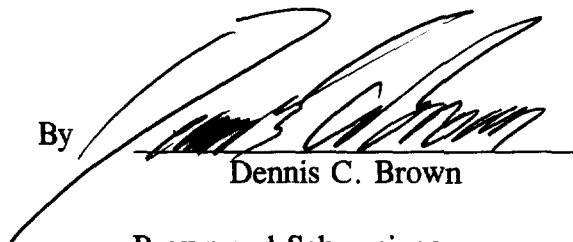
In the above captioned matter, the Commission has placed Kay on trial for his economic life. In fairness to Kay, Kay has a right to a determination by the Chairman as to whether the Commission's Rules were violated in the course of the investigation, prior to having to prepare or present a defense. He is also entitled to have the Commission provide him with the right to the timely action guaranteed to him by Section 405(a) of the Act. All persons involved in this proceeding should have the benefit of efficient proceedings.

Conclusion

In the interest of justice and in the interest of administrative efficiency, Kay respectfully requests that the Judge defer all further proceedings in the instant matter until the Chairman has acted on Kay's above referenced complaints, and until the Commission has taken the overdue action to which Kay is entitled on his above referenced petitions for reconsideration of license grants made without hearings, and until the Commission has acted on Kay's Motion to Enlarge.

Respectfully submitted,  
JAMES A. KAY, JR.

By

A handwritten signature in black ink, appearing to read "Dennis C. Brown", written over a horizontal line.

Dennis C. Brown

Brown and Schwaninger  
1835 K Street, N.W.  
Suite 650  
Washington, D.C. 20006  
202/223-8837

Dated: January 12, 1995

## **EXHIBIT I**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of

W. RILEY HOLLINGSWORTH

To: The Chairman

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FCC File No.

**RECEIVED**

**'JUL 27 1994**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

PETITION FOR REVIEW AND INSPECTION OF EMPLOYEE CONDUCT

JAMES A. KAY, JR.

Dennis C. Brown  
Brown and Schwaninger  
1835 K Street, N.W.  
Suite 650  
Washington, D.C. 20006  
202/223-8837

Dated: July 27, 1994

## Table of Contents

Summary of the Filing . . . . .	i
Background . . . . .	2
Hollingsworth's Actions Violated The Commission's Rules of Employee Responsibilities And Conduct . . . . .	5
Hollingsworth's Actions Violated Kay's Fifth Amendment Right To Due Process Of Law . . . . .	6
Hollingsworth's Actions Violated Kay's Procedural Rights Under The Communications Act . . . . .	7
Hollingsworth's Actions Deprived Kay Of Procedural Rights Provided Kay By The Commission's Policies And Rules . . . . .	8
Hollingsworth Has Demonstrated An Intent To Abuse The Commission's Processes . . . . .	12
The Commission Should Take Immediate Action To Remedy Hollingsworth's Actions . . . . .	13
Conclusion . . . . .	14



### SUMMARY OF THE FILING

James A. Kay, Jr., respectfully requests that the Chairman determine that formal disciplinary action should be taken concerning Commission employee W. Riley Hollingsworth (Hollingsworth) and requests that the Chairman refer the instant disciplinary action to the Commission for action.

Hollingsworth violated the Commission's Rules of employee responsibilities and conduct by giving preferential treatment to certain other persons, by losing impartiality, making a Government decision outside of official channels, and adversely affecting the confidence of the public in the integrity of the Government.

Hollingsworth unlawfully dismissed certain applications filed by Kay, rather than giving Kay the right to a hearing provided to him by the Communications Act.

Hollingsworth imposed an *ultra vires* sanction on Kay by dismissing certain of his applications. Dismissal of an application is not a lawful sanction under the Commission's Standards for Assessing Forfeitures.

Hollingsworth unlawfully dismissed a petition for reconsideration filed by Kay without giving Kay the opportunity to file a reply guaranteed to Kay by the Commission's Rules.

Hollingsworth either caused or permitted to occur under his authority and responsibility an unlawful delay in the Commission's disposition of certain petitions for reconsideration filed by Kay concerning grants of licenses without hearings.

Hollingsworth caused delays in the processing of certain of Kay's applications, while either causing or permitting to occur under his authority and responsibility other, later-filed applications to be processed to grant before the Commission processed Kay's applications.

Hollingsworth has expressed an intent to abuse the Commission's hearing processes to use the hearing process, itself, as a sanction against Kay.

Hollingsworth's unlawful actions have caused Kay losses amounting to at least \$714,600.00.

Kay respectfully requests that the Chairman investigate Hollingsworth's actions concerning Kay and that the Commission take appropriate disciplinary action.

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
W. RILEY HOLLINGSWORTH ) FCC File No.  
 )

To: The Chairman

PETITION FOR REVIEW AND INSPECTION OF EMPLOYEE CONDUCT

James A. Kay, Jr., by his attorneys, respectfully requests the Chairman to determine that formal disciplinary action should be taken concerning a Commission employee and to refer the the instant disciplinary matter to the Commission for action.<sup>1</sup> In support of his position, Kay shows the following.

Revised Administrative Order No. 10, dated December 15, 1965, provides that "the Chairman shall have primary responsibility for the administration of the Commission's Review and Inspection Program concerning the conduct of all Commission employees except the Commissioners with respect to acts of impropriety, unethical conduct, and acts short of criminal violation which could bring discredit upon the Commission and the Federal service."<sup>2</sup>

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<sup>1</sup> Concurrently herewith, Kay is filing with the Chief, Private Radio Bureau, a Petition for Reconsideration of the Bureau's issuance of a reinstated license to Liberty Paving Inc. in the above captioned matter. Kay's Petition for Reconsideration raises other issues concerning the Bureau's action, however, those issues do not necessarily demonstrate that the Bureau engaged in improper conduct in its action.

<sup>2</sup> Administrative Order No. 10 is referenced at Section 1.1216(b) of the Commission's Rules, which provides, as follows, "*Commission Personnel*. For violations of the provisions of this subpart by Commission personnel refer to Administrative Order No. 10."

Administrative Order No. 10 directs that "any instance of misconduct on the part of Commission employee which, in the Chairman's opinion, requires formal disciplinary action shall be referred to the Commission for action." Accordingly, Kay respectfully requests that the Chairman take the appropriate action in this matter.

### Background

On January 31, 1994, W. Riley Hollingsworth (Hollingsworth), Deputy Chief, Licensing Division, Private Radio Bureau, wrote a letter (the January 31 letter) to Kay on behalf of the Commission requesting certain information pursuant to Section 308(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §308(b). In its January 31 letter, the Commission stated that it needed "more information to determine whether [Kay is] qualified to be a Commission licensee."<sup>3</sup> With respect to 16 applications, in letters signed by Hollingsworth, the Commission notified Kay that it needed the information requested by its January 31 letter "in order to determine what action to take on the above captioned application[s]".<sup>4</sup>

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<sup>3</sup> In a Declaration filed with Federal District Court for the District of Columbia, Terry L. Fishel (Fishel), Chief, Land Mobile Branch, Licensing Division, Private Radio Bureau, stated that it was his determination that the Commission should investigate certain matters concerning Mr. Kay. Kay believes that Fishel is an immediate subordinate of Hollingsworth. Based on a separate matter, Kay has requested that the Chairman investigate Fishel's actions and take appropriate disciplinary action. In view of the similarity of some actions taken by Fishel and Hollingsworth which have adversely, unfairly, and unlawfully affected Kay, the Commission should consider the extent to which Fishel may have complicity in the above captioned matter.

<sup>4</sup> The applications had been assigned File Nos. 415060, 415243, 415255, 415274, 415294, 415303, 415304, 415315, 415316, 415317, 415322, 415332, 415333, 415347, 628816, and 632210.

In a letter to undersigned counsel dated May 20, 1994, Hollingsworth stated that "failure to provide the requested information constitutes a violation of the Commission's Rules and will subject Kay to sanctions, including a hearing before an Administrative Law Judge to determine whether Kay's licenses should be revoked." In letters to Kay of various dates concerning each of the 16 applications, Hollingsworth stated that "failure to submit the information requested will result in dismissal of the referenced applications." By a letter dated July 5, 1994, Hollingsworth dismissed Kay's 16 applications.

On April 5, 1994, Kay filed a Petition for Reconsideration of the Commission's action in the matter of Ronald R. Parnell d/b/a Parnell Landscaping, et al., FCC File No. 553538 in which the Commission had granted without a hearing the applications of Parnell and six related applications filed by other persons requesting new radio station licenses. The Commission has not yet acted on Kay's Petition.

In the matter of Harold Pick d/b/a Communications Consultants and Systems, FCC File No. 621083, the Commission granted, without a hearing, Pick's application for modification of a radio station license. On June 16, 1993, Kay filed a timely petition for reconsideration of that action. Not until October 27, 1993, did the Commission act on Kay's petition.

In the matter of Harold Pick and/or Computer Consultants and Systems, FCC File No. 614055, the Commission granted, without a hearing, Pick's application for consent to assignment

to Pick of a radio station license. On May 28, 1993, Kay filed a timely petition for reconsideration in that matter. The Commission has not yet acted on Kay's petition.

In the matter of Gary Dent, et al., FCC File No. 558590, the Commission granted, without a hearing, the applications of Dent and five other persons for new radio station licenses. On February 14, 1992, Kay filed a timely petition for reconsideration of the grants of those applications. Not until June 22, 1992, did the Commission act on Kay's petition. Subsequently, on July 22, 1992, Dent and the other five persons filed a petition for reconsideration of the Commission's action on Kay's petition. Not until March 23, 1993, did the Commission act on their petition.<sup>5</sup>

On June 24, 1994, Kay filed a Petition for Reconsideration against the grant of certain applications which, although filed later in time than some of his above captioned applications, were processed to grant prior to Commission action on Kay's applications. Only one of the opposing parties filed any opposition. However, without affording Kay the right provided to him under the Commission's Rules to file a reply, Hollingsworth, on July 13, 1994, dismissed Kay's Petition for Reconsideration.<sup>6</sup>

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<sup>5</sup> The Gary Dent matter is currently before the Commission on an application for review filed by Kay.

<sup>6</sup> Kay respectfully suggests that the Commission compare Hollingsworth's premature dismissal of Kay's Petition for Reconsideration to the action of Fishel in the matter of Liberty Paving, Inc. Fishel's action in the Liberty Paving matter is the subject of a separate complaint by Kay to the Chairman.

HOLLINGSWORTH'S ACTIONS VIOLATED THE COMMISSION'S RULES OF EMPLOYEE  
RESPONSIBILITIES AND CONDUCT

Section 19.735-201a of the Commission's Rules provides, in relevant part, that  
an employee shall avoid any action, whether or not specifically prohibited by this  
subpart, which might result in, or create the appearance of: . . .

- (b) Giving preferential treatment to any person; . . .
- (d) Losing complete independence and impartiality;<sup>7</sup>
- (e) Making a Government decision outside official channels;
- (f) Affecting adversely the confidence of the public in the integrity of the  
Government,

47 U.S.C. §19.735-201a. In the matters referred to above, Hollingsworth's actions resulted in,  
or created the appearance of, the Commission's giving preferential treatment to certain other  
persons, losing impartiality, making a Government decision outside official channels, and  
adversely affecting the confidence of the public in the integrity of the Government. Section  
19.735-101 of the Commission's Rules provides that "the Commission has delegated to the  
Chairman responsibility for the detection and prevention of acts, short of criminal violations,  
which could bring discredit upon the Commission and the Federal service," 47 U.S.C. §19.735-  
101. Accordingly, the Chairman should review Hollingsworth's actions in these matters to  
determine whether they violated any of the provisions of Rule Section 19.735-201a.

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<sup>7</sup> Kay provides radio communications service to a large number of eligible persons in  
the Los Angeles, California, area. As a consequence of his successful activities, Kay has  
necessarily become involved in a large number of controversies before the Commission. Kay  
recognizes that the number of cases in which he has been involved, many of which are still  
pending, has created a great deal of work for the Commission staff. While Kay regrets the  
burden which these matters have cast upon the Commission as the agency having sole  
jurisdiction in field, Kay is entitled to fair and impartial consideration of his position in each  
matter. Kay respectfully suggests that the Chairman's review and inspection may disclose that  
certain Commission employees have developed an exceptional dislike for Kay, and in the instant  
matter a Commission employee may have lost the ability to act with complete impartiality with  
respect to Kay.

HOLLINGSWORTH'S ACTIONS VIOLATED KAY'S FIFTH AMENDMENT RIGHT  
TO DUE PROCESS OF LAW

The Fifth Amendment to the United States Constitution provides that "no person . . . shall be deprived of life, liberty, or property without due process of law," U.S. CONST, AMEND. V. By unlawfully dismissing Kay's applications and Kay's petition for reconsideration concerning untimely actions on the applications of other applicants, and by failing to take timely action on Kay's petitions for reconsideration of the licensing of certain stations, Hollingsworth deprived Kay of property without due process of law.<sup>8</sup>

It is Kay's fundamental right to have an opportunity to be heard before an agent of the federal government deprives him of property, *see, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970). Moreover, Kay has specific procedural rights provided by the Communications Act and by the Commission's Rules of which Hollingsworth's actions deprived him.

Kay is regularly engaged in the radio communications business and derives his livelihood from providing radio communications service and equipment to eligible persons on a commercial basis. Accordingly, his ability to engage in that occupation and to continue to grow and develop his business is both a property right and a right of liberty. If Kay is to continue to engage in his business in the tough competitive environment of Los Angeles, he requires fair and even handed action on his applications for authority to improve his service to his customers and he

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<sup>8</sup> In contrast, some cases in which Kay is the party seeking relief have been pending before the Commission for more than two years.



requires fair and expeditious action on petitions which he files concerning the applications of other persons and on petitions concerning the Commission's actions. Because Kay does business on channels on which exclusive authorizations are available, each of Kay's applications and petitions has a determinable property value.<sup>9</sup> Under the Commission's Part 1 and Part 90 Rules, Kay has a right to consideration of his applications in a specific procedural manner, which provides an early applicant with a right to a certain sequence of processing which is directly translatable to a determinable property value.

**HOLLINGSWORTH'S ACTIONS VIOLATED KAY'S PROCEDURAL RIGHTS  
UNDER THE COMMUNICATIONS ACT**

Section 309(a) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. §309(a) provides that "the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application." Section 309(e) of the Communications Act of 1934, 47 U.S.C. §309(e), provides that "if the Commission for any reason is unable to find that

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<sup>9</sup> While the Commission has taken the position that a radio station license is not a species of property and has no value, the right to do business which the license provides has a distinct and readily determinable value in the marketplace. This value results from the stream of income which will flow from the provision of radio communications service to eligible persons under the authorization. The value of the exclusive right to do business on a certain frequency is customarily found by the market to require the exchange of a greater amount of property for the right than the amount of property which must be supplied in consideration of the right to do business on a non-exclusive basis. To the extent that the Commission delays in granting an application, the stream of income that can be projected to flow from exercise of the authority will also be delayed. It would be bizzare, indeed, for the Commission to take the position that a person's has no right to due process of law before an independent regulatory agency merely because the Commission declines to perceive any property right or value in a radio station license.

grant of [an] application would be consistent with subsection (a), it shall proceed as provided in subsection (e)," 47 U.S.C. §308(d)(2). Subsection (e) of Section 308 of the Act requires that the Commission "formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally," 47 U.S.C. §308(e).

It would appear that Hollingsworth was not convinced that the public interest, convenience and necessity would be served by grant of Kay's 16 applications. However, the Commission's inability to reach the necessary conclusion concerning the public interest did not authorize Hollingsworth to dismiss Kay's applications. Rather, the Commission was (and is) required to formally designate each application for hearing and give Kay an opportunity to be heard concerning each particular matter or thing which the Commission may place in issue.

**HOLLINGSWORTH'S ACTIONS DEPRIVED KAY OF PROCEDURAL RIGHTS  
PROVIDED KAY BY THE COMMISSION'S POLICIES AND RULES**

It is clear that Hollingsworth intended to punish Kay for failing to satisfy Hollingsworth's hopes concerning the Commission's January 31 letter, and that he used dismissal of Kay's applications as an *ultra vires* form of sanction of Kay. In his letters, Hollingsworth had advised Kay that failing to supply the requested information would constitute a violation of the Commission's Rules. The Commission's Standards for Assessing Forfeitures do not include the dismissal of an application as a lawful sanction for an applicant's allegedly failing to supply

requested information. Accordingly, Hollingsworth's sanctioning of Kay by dismissal of his 16 applications was clearly without the authority of the Commission.

In its Order in Century Southwest Cable Television Corp. , \_\_\_\_\_ FCC Rcd. \_\_\_\_\_ (DA 94-489 Released May 13, 1994), the Cable Services Bureau was confronted with a situation in which a local franchising authority had imposed a sanction, namely, reduced the rate which a cable could collect from its customers to zero. At paragraph eight of its Order, the Commission found that "West Hollywood has conceded that it temporarily set Century's installation rates at zero to encourage Century's full compliance with the City's repeated requests for more information." The Commission stayed the effectiveness of West Hollywood's sanction on Century. Based on the principle to be derived from Century Southwest Cable Television Corp. that imposing an economic sanction is an inappropriate and unlawful means of attempting to obtain information from a regulatee, Hollingsworth's dismissal action was contrary to Commission precedent.

Section 1.45(b) of the Commission's Rules provides that a person who files an original pleading, such as Kay's Petition for Reconsideration of the grant of certain applications prior to completion of processing of Kay's applications, with the right to "reply to oppositions within 5 days after the time for filing oppositions has expired," 47 C.F.R. §1.45(b). However, without providing Kay with the opportunity guaranteed by the Commission's Rules to respond to an opposition which was filed, and to point out to the Commission that certain parties who might

have filed oppositions had failed to oppose the Petition for Reconsideration, Hollingsworth dismissed Kay's Petition.

Section 405(a) of the Act provides that in any case in which a Petition for Reconsideration "relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition," 47 U.S.C. §405(a). In each of the following matters,<sup>10</sup> Kay filed a petition for reconsideration of an instrument of authorization granted to another party without a hearing, however, the Commission failed to act in a timely manner in any of these matters:

- 1) Ronald R. Parnell d/b/a Parnell Landscaping, et al.
- 2) Harold Pick d/b/a Communications Consultants and Systems
- 3) Harold Pick and/or Computer Consultants and Systems
- 4) Gary Dent, et al.

Kay believes that in his position as Deputy Chief of the Licensing Division, Hollingsworth has had the authority to assure that the Commission provided Kay with the right to a speedy determination guaranteed to him by Section 405(a) of the Act. Hollingsworth also had the power to prevent Kay from receiving the speedy action to which the Communications Act entitles Kay.

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<sup>10</sup> The four examples cited are not believed to enumerate all of the instances in which the Commission has failed to act in a timely manner concerning Kay's petitions for reconsideration of grants of licenses without hearings. However, the four examples should be sufficient to demonstrate the basis for Kay's requesting inspection and review of Hollingsworth's conduct.

Whether by neglect or intent, Hollingsworth has failed to provide Kay with the procedural right to which Kay is entitled. The Commission should determine Hollingsworth's responsibility for carrying out the mandate of Section 405(a) of the Act with respect to licensing controversies in which Kay is a party and should take action appropriate to its findings.

Section 90.143 of the Commission's Rules, which applies to all applications for licenses in the Private Radio Services, provides that "all applications in pending status will be processed in the order in which the application acceptable for filing was received by the Commission," 47 C.F.R. §90.143. Rule Section 90.611(b), which applies to applications requesting the use of frequencies above 800 MHz, provides that "all applications in pending status will be processed in the order in which they are received, determined by the date on which the application was received by the Commission in its Gettysburg, PA office," 47 C.F.R. §90.611(b). Although Kay had filed certain applications prior to the filing of applications by other persons,<sup>11</sup> Hollingsworth intentionally imposed a delay on the processing of Kay's applications, without also imposing the same delay on later-filed applications of other persons, thereby causing the Commission to process the applications filed by other persons prior to its processing of Kay's applications.<sup>12</sup>

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<sup>11</sup> For example, Kay had filed certain of the applications referred to at footnote 4, *supra*, prior to the date of filing of applications by other persons which were assigned File Nos. 415092, 415115, 415260, 415313, 415261, 415283, 415289, 415065, 415249, 415277, and 628964.

<sup>12</sup> Kay respectfully notes that a position that "processing" means something less than complete processing of an application to a final disposition would render Rule Sections 90.143 and 90.611(b) nullities.

HOLLINGSWORTH HAS DEMONSTRATED AN INTENT  
TO ABUSE THE COMMISSION'S PROCESSES

As cited above, Hollingsworth placed Kay on notice that it was Hollingsworth's intent to impose a sanction on Kay by subjecting Kay to a hearing before an Administrative Law Judge concerning Kay's qualifications to be a Commission licensee.<sup>13</sup> Under no concept of American jurisprudence and administrative procedure can a trial-type procedure lawfully be used for the purpose of sanctioning the accused by subjecting him to the burden of trial, itself. Under American concepts of fundamental fairness, a hearing should be a dispassionate search for the truth, and under the Constitution, no penalty can lawfully be imposed except as the result of a determination of a fair hearing. Hollingsworth's express intent to cause Kay to suffer a sanction by bearing the burden of a hearing on his qualifications to be a Commission licensee demonstrates a clear intent by Hollingsworth to abuse the Commission's processes in an unauthorized attempt to punish Kay.<sup>14</sup>

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<sup>13</sup> It is perplexing to Kay that, on the one hand, Hollingsworth dismissed Kay's above captioned applications rather than providing him with the right to a hearing guaranteed by the Communications Act, while, on the other hand, he threatened to make Kay suffer a sanction by causing the Commission to hold a hearing on his qualifications to be a Commission licensee. Perhaps it was Hollingsworth's calculation that he could cause the greatest injury to Kay by depriving Kay of a right to a hearing on his applications until such time as Kay had suffered a sufficiently long time through the Commission's appellate procedures and subsequent appellate court litigation. If so, then Hollingsworth's action to punish Kay by dismissing Kay's applications was doubly heinous.

<sup>14</sup> Given Hollingsworth's express statement that it is the Commission intent to sanction Kay merely by placing on him the burden of a hearing on his qualifications to be a Commission licensee, it does not appear that Hollingsworth has left the Commission any opportunity to hold a hearing on Kay's qualifications which would be untainted by an overt Commission intent to cause the process, itself, to serve as sanction upon Kay. Accordingly, not only have Hollingsworth's actions been unfair to Kay, they have called into question the Commission's fundamental fairness and ability to carry out its mandate, thereby bringing the Commission into disrepute.

THE COMMISSION SHOULD TAKE IMMEDIATE ACTION  
TO REMEDY HOLLINGSWORTH'S ACTIONS

Hollingsworth's improper actions in the instant matter bring discredit on the Commission and on the Federal service. The Commission has adopted codified rules which are intended to protect the rights of parties and to protect the integrity of the Commission's processes and procedures. A willful violation of the rights of a party to due process of law, willful violations of the Commission's Rules, and an express intent to abuse the Commission's processes for an improper purpose, such as have occurred in the instant matter, brings the entire Commission into disrepute and makes all actions of the Commission suspect. To restore the integrity of the Commission, and to afford relief to Kay, the Chairman should review and inspect the actions of its employee in the instant matter and the Commission should take appropriate action.

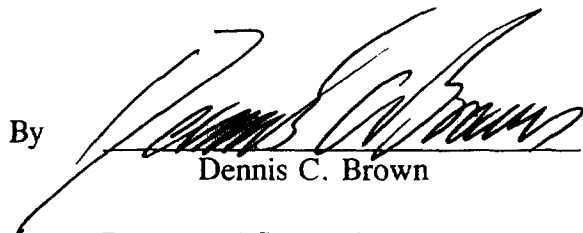
By the applications which Hollingsworth unlawfully dismissed, Kay requested authority to provide service to 791 additional mobile units. During the term of the requested license, Kay could reasonably expect to derive \$714,600.00 in revenues from provision of radio communications service to those additional mobile units. The Commission's unlawful dismissal of Kay's applications action has deprived Kay of at least \$714,600.00 in reasonably foreseeable revenues. Accordingly, as part of the disciplinary action which the Commission should take in the instant matter, Kay requests that the Commission order Hollingsworth to compensate Kay for the full value of the revenue which Hollingsworth's actions have cost Kay. Kay also requests that the Commission take such other disciplinary action as will be effective in deterring any future abuse of the rights of persons who are regulated by the Commission.

Conclusion

For all the foregoing reasons, Kay respectfully requests that the Chairman review and inspect the actions of the Commission employee cited herein and recommend that the Commission take appropriate disciplinary action.<sup>15</sup>

Respectfully submitted,  
JAMES A. KAY, JR.

By

A handwritten signature in black ink, appearing to read "Dennis C. Brown", is written over a horizontal line.

Dennis C. Brown

Brown and Schwaninger  
1835 K Street, N.W.  
Suite 650  
Washington, D.C. 20006  
202/223-8837

Dated: July 27, 1994

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<sup>15</sup> All matters of fact stated herein are already matters of record with the Commission.



Certificate Of Service

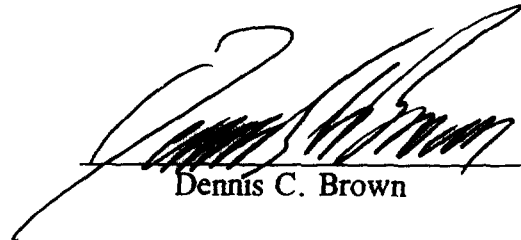
I hereby certify that on this 27th day of July 1994, I caused to be served, by hand, a copy of the foregoing Petition for Review and Inspection of Employee Conduct on each of the following persons:

W. Riley Hollingsworth, Deputy Chief\*  
Licensing Division  
Federal Communications Commission  
1270 Fairfield Road  
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\* Arrangements made for delivery to be made by hand on July 27, 1994.